

**STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD**



CASSANDRA SMITH,

Charging Party,

v.

SEIU UNITED LONG TERM CARE WORKERS,

Respondent.

Case No. SF-CO-262-M

PERB Decision No. 2247-M

April 6, 2012

Appearance: Cassandra Smith, on her own behalf.

Before Martinez, Chair; Dowdin Calvillo and Huguenin, Members.

DECISION

DOWDIN CALVILLO, Member: This case is before the Public Employment Relations Board (Board) on appeal by Cassandra Smith (Smith) of the Office of the General Counsel's dismissal (attached) of her unfair practice charge. The charge alleged that SEIU United Long Term Care Workers breached its duty of fair representation under the Meyers-Milias-Brown Act (MMBA)¹ by failing to assist Smith in obtaining proper payment for her services as an in-home services provider. The Board agent found that the charge failed to state a prima facie violation of the duty of fair representation.

The Board has reviewed the dismissal and the record in light of Smith's appeal and the relevant law. Based on this review, we find the dismissal and warning letters to be well-reasoned, adequately supported by the record, and in accordance with applicable law. Accordingly, the Board adopts the dismissal and warning letters as the decision of the Board itself.

¹ The MMBA is codified at Government Code section 3500 et seq.

ORDER

The unfair practice charge in Case No. SF-CO-262-M is hereby DISMISSED WITHOUT
LEAVE TO AMEND.

Chair Martinez and Member Huguenin joined in this Decision.

PUBLIC EMPLOYMENT RELATIONS BOARD

Sacramento Regional Office
1031 18th Street
Sacramento, CA 95811-4124
Telephone: (916) 327-8386
Fax: (916) 327-6377



October 24, 2011

Cassandra Smith

Re: *Cassandra Smith v. SEIU United Long Term Care Workers*
Unfair Practice Charge No. SF-CO-262-M
DISMISSAL LETTER

Dear Ms. Smith:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on August 26, 2011. Cassandra Smith (Smith or Charging Party) alleges that the SEIU United Long Term Care Workers (SEIU or Respondent) violated the Meyers-Milias-Brown Act (MMBA or Act)¹ by breaching its duty of fair representation.

Charging Party was informed in the attached Warning Letter dated September 30, 2011, that the above-referenced charge did not state a prima facie case. You were advised that, if there were any factual inaccuracies or additional facts that would correct the deficiencies explained in that letter, you should amend the charge. You were further advised that, unless you amended the charge to state a prima facie case or withdrew it prior to October 14, 2011, the charge would be dismissed.

PERB has not received either an amended charge or a request for withdrawal. On October 17, 2011, the undersigned Board Agent spoke with Charging Party stating that PERB had not received any response to the Warning Letter and that the charge would be dismissed. At that time, Charging Party stated that she would be filing an amended charge by October 18, 2011. On October 18, 2011, Charging Party's process server, Cynthia Gail Walker, sent a letter to PERB enclosing a proof of service. However, an amended charge was not submitted with the letter, and no additional facts were included in the letter. Therefore, the charge is hereby dismissed based on the facts and reasons set forth in the September 30, 2011 Warning Letter.

¹ The MMBA is codified at Government Code section 3500 et seq. The text of the MMBA and PERB Regulations may be found at www.perb.ca.gov.

Right to Appeal

Pursuant to PERB Regulations,² Charging Party may obtain a review of this dismissal of the charge by filing an appeal to the Board itself within twenty (20) calendar days after service of this dismissal. (Cal. Code Regs, tit. 8, § 32635, subd. (a).) Any document filed with the Board must contain the case name and number, and the original and five (5) copies of all documents must be provided to the Board.

A document is considered "filed" when actually received during a regular PERB business day. (Cal. Code Regs, tit. 8, §§ 32135, subd. (a) and 32130; see also Gov. Code, § 11020, subd. (a).) A document is also considered "filed" when received by facsimile transmission before the close of business together with a Facsimile Transmission Cover Sheet which meets the requirements of PERB Regulation 32135(d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Cal. Code Regs, tit. 8, § 32135, subds. (b), (c) and (d); see also Cal. Code Regs., tit. 8, §§ 32090 and 32130.)

The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95811-4124
(916) 322-8231
FAX: (916) 327-7960

If you file a timely appeal of the refusal to issue a complaint, any other party may file with the Board an original and five copies of a statement in opposition within twenty (20) calendar days following the date of service of the appeal. (Cal. Code Regs, tit. 8, § 32635, subd. (b).)

Service

All documents authorized to be filed herein must also be "served" upon all parties to the proceeding, and a "proof of service" must accompany each copy of a document served upon a party or filed with the Board itself. (See Cal. Code Regs., tit. 8, § 32140 for the required contents.) The document will be considered properly "served" when personally delivered or deposited in the mail or deposited with a delivery service and properly addressed. A document may also be concurrently served via facsimile transmission on all parties to the proceeding. (Cal. Code Regs, tit. 8, § 32135, subd. (c).)

² PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

Extension of Time

A request for an extension of time, in which to file a document with the Board itself, must be in writing and filed with the Board at the previously noted address. A request for an extension must be filed at least three (3) calendar days before the expiration of the time required for filing the document. The request must indicate good cause for and, if known, the position of each other party regarding the extension, and shall be accompanied by proof of service of the request upon each party. (Cal. Code Regs, tit. 8, § 32132.)

Final Date

If no appeal is filed within the specified time limits, the dismissal will become final when the time limits have expired.

Sincerely,

M. SUZANNE MURPHY
General Counsel

By Katharine Nyman
Regional Attorney

Attachment

cc: Vincent Harrington, Jr., Attorney

PUBLIC EMPLOYMENT RELATIONS BOARD

Sacramento Regional Office
1031 18th Street
Sacramento, CA 95811-4124
Telephone: (916) 327-8386
Fax: (916) 327-6377



September 30, 2011

Cassandra Smith

Re: *Cassandra Smith v. SEIU United Long Term Care Workers*
Unfair Practice Charge No. SF-CO-262-M
WARNING LETTER

Dear Ms. Smith:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on August 26, 2011. Cassandra Smith (Smith or Charging Party) alleges that the SEIU United Long Term Care Workers (SEIU or Respondent) violated the Meyers-Milias-Brown Act (MMBA or Act)¹ by breaching its duty of fair representation.

Charging Party appears to be an In-Home-Support-Services worker for the Alameda County Department of Social Services. According to the charge, Charging Party believed she was improperly or untimely paid for work completed. Thereafter, Charging Party made a complaint to SEIU. Though unclear, it appears that SEIU told her "no one will no [sic] when they get paid, it don't come at the same time." According to Charging Party, SEIU is "not on [her] side."

PERB Regulation 32615(a)(5)² requires, inter alia, that an unfair practice charge include a "clear and concise statement of the facts and conduct alleged to constitute an unfair practice." The charging party's burden includes alleging the "who, what, when, where and how" of an unfair practice. (*State of California (Department of Food and Agriculture)* (1994) PERB Decision No. 1071-S, citing *United Teachers-Los Angeles (Ragsdale)* (1992) PERB Decision No. 944.) Mere legal conclusions are not sufficient to state a prima facie case. (*Ibid.*; *Charter Oak Unified School District* (1991) PERB Decision No. 873.)

While the MMBA does not expressly impose a statutory duty of fair representation upon employee organizations, the courts have held that "unions owe a duty of fair representation to their members, and this requires them to refrain from representing their members arbitrarily, discriminatorily, or in bad faith." (*Hussey v. Operating Engineers* (1995) 35 Cal.App.4th

¹ The MMBA is codified at Government Code section 3500 et seq. The text of the MMBA and PERB Regulations may be found at www.perb.ca.gov.

² PERB regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

1213.) In *Hussey*, the court further held that the duty of fair representation is not breached by mere negligence and that a union is to be “accorded wide latitude in the representation of its members . . . absent a showing of arbitrary exercise of the union’s power.”

In *International Association of Machinists (Attard)* (2002) PERB Decision No. 1474-M, the Board determined that it is appropriate in duty of fair representation cases to apply precedent developed under the other acts administered by the Board. The Board noted that its decisions in such cases, including *Reed District Teachers Association, CTA/NEA (Reyes)* (1983) PERB Decision No. 332 and *American Federation of State, County and Municipal Employees, Local 2620 (Moore)* (1988) PERB Decision No. 683-S, are consistent with the approach of both *Hussey* and federal precedent (*Vaca v. Sipes* (1967) 386 U.S. 171).

With regard to when “mere negligence” might constitute arbitrary conduct, the Board observed in *Coalition of University Employees (Buxton)* (2003) PERB Decision No. 1517-H that, under federal precedent, a union’s negligence breaches the duty of fair representation “in cases in which the individual interest at stake is strong and the union’s failure to perform a ministerial act completely extinguishes the employee’s right to pursue his claim.” (Quoting *Dutrisac v. Caterpillar Tractor Co.* (9th Cir. 1983) 749 F.2d 1270, at p. 1274; see also, *Robesky v. Quantas Empire Airways Limited* (9th Cir. 1978) 573 F.2d 1082.)

Thus, in order to state a prima facie violation of the duty of fair representation under the MMBA, a charging party must at a minimum include an assertion of facts from which it becomes apparent in what manner the exclusive representative’s action or inaction was without a rational basis or devoid of honest judgment. (*International Association of Machinists (Attard)*, *supra*, PERB Decision No. 1474-M.) The burden is on the charging party to show how an exclusive representative abused its discretion, and not on the exclusive representative to show how it properly exercised its discretion. (*United Teachers – Los Angeles (Wylar)* (1993) PERB Decision No. 970.)

As presently written, nothing in the charge demonstrates how SEIU’s alleged conduct was arbitrary, discriminatory, or in bad faith and thus does not establish a prima facie violation. To the extent Charging Party alleges that SEIU breached its duty of fair representation by failing to pursue a grievance based on Charging Party’s belief that she was improperly paid, the Board has held that a union has the discretion whether or not to pursue a grievance. (*United Teachers of Los Angeles (Thomas)* (2010) PERB Decision No. 2150.) Refusal to pursue a grievance the union believes is unmeritorious is not a violation, as long as the refusal is not arbitrary, discriminatory, or in bad faith. (*Ibid.*) It is the charging party’s burden to allege facts which demonstrate that the refusal was arbitrary, discriminatory, or in bad faith. (*Ibid.*) Where charging party failed to do so, the charge failed to establish a prima facie case for breach of the duty of fair representation. (*Ibid.*) Regardless, as previously stated, nothing in the charge demonstrates how SEIU’s alleged conduct was arbitrary, discriminatory, or in bad faith and thus does not establish a prima facie violation.

For these reasons the charge, as presently written, does not state a prima facie case.³ If there are any factual inaccuracies in this letter or additional facts that would correct the deficiencies explained above, Charging Party may amend the charge. The amended charge should be prepared on a standard PERB unfair practice charge form, clearly labeled First Amended Charge, contain all the facts and allegations you wish to make, and be signed under penalty of perjury by an authorized agent of Charging Party. The amended charge must have the case number written on the top right hand corner of the charge form. The amended charge must be served on the Respondent's representative and the original proof of service must be filed with PERB. If an amended charge or withdrawal is not filed on or before October 14, 2011,⁴ PERB will dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,

Katharine Nymah
Regional Attorney

KN

³ In *Eastside Union School District* (1984) PERB Decision No. 466, the Board explained that a prima facie case is established where the Board agent is able to make "a determination that the facts as alleged in the charge state a legal cause of action and that the charging party is capable of providing admissible evidence in support of the allegations. Consequently, where the investigation results in receipt of conflicting allegations of fact or contrary theories of law, fair proceedings, if not due process, demand that a complaint be issued and the matter be sent to formal hearing." (*Ibid.*)

⁴ A document is "filed" on the date the document is **actually received** by PERB, including if transmitted via facsimile. (PERB Regulation 32135.)